Garage Management Corporation *and* Gordon Pace, an Individual. Case 2–CA–29633

August 3, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND WALSH

On February 17, 1999, Administrative Law Judge Steven Davis issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed cross-exceptions and a brief in opposition to the General Counsel's exceptions and in support of cross-exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified.

We adopt the judge's decision in its entirety, including his finding that the Respondent violated Section 8(a)(1) of the Act by filing a baseless lawsuit against Gordon Pace in the New York State Supreme Court on August 12, 1996,[1] in retaliation for his protected, concerted activities. We also find that this lawsuit violated Section 8(a)(4) of the Act. Accordingly, we find merit in the General Counsel's exception to the judge's failure to order the Respondent to reimburse Pace for his legal and other expenses incurred in his defense of the August 12, 1996, baseless and retaliatory state court lawsuit.[2]

The 8(a)(4) Violation

In his February 17, 1999 decision, the judge found that:

> The evidence is thus clear that this lawsuit was filed in retaliation for Pace's filing the various charges, grievances and complaints [with the Board and other agencies] against Respondent. The litigation was filed in response to Pace's filing of these actions, and sought to prevent him from filing further charges against Respondent, and prevent him from "conspiring with or encouraging" other employees to file charges against it. Thus this lawsuit not only was brought to retaliate against Pace for the filing of the various causes, and for engaging in protected, concerted activities with others, but to specifically enjoin him from engaging in his right to file further charges against it. The lawsuit was a direct attempt by Respondent to nullify the Board's jurisdiction as it affects Pace. (Citation omitted.)

Accordingly, the judge found that the Respondent's conduct violated Section 8(a)(4) and (1) of the Act.

The next day, however, the judge issued without explanation an errata rescinding the finding of an 8(a)(4) violation. In his exceptions and brief, counsel for the General Counsel asserts that although Pace's unfair labor practice charge alleged that the lawsuit violated Section 8(a)(4) and (1), the 8(a)(4) allegation was inadvertently omitted from the complaint. Citing *Pergament United Sales, Inc.*, 296 NLRB 333 (1989), enfd. 920 F.2d 130 (2d Cir. 1990), the General Counsel asserts that the 8(a)(4) violation is closely connected to the subject matter of the complaint and has been fully litigated. Accordingly, he asks the Board to find that the Respondent's August 12, 1996 lawsuit against Pace violated Section 8(a)(4) as well as Section 8(a)(1).

We find merit in the General Counsel's exception. It is well settled that the Board may find and remedy a violation, even in the absence of a specified allegation in the complaint, if the issue is closely connected to the subject matter of the complaint and has been fully litigated. *Pergament*, supra at 334. This practice has been followed in instances when the allegation found involved a different section of the Act than that alleged. See *Woodline Motor Freight*, 278 NLRB 1141, 1237 (1986), enfd. in pertinent part 843 F.2d 285 (8th Cir. 1988) (work rule change violated Sec. 8(a)(3) and (4) despite absence of an 8(a)(4) allegation).

With respect to the 8(a)(1) and 8(4) allegations here, both allegations focus on the same set of facts, i.e., the Respondent's purpose for filing the state court lawsuit against Pace. The ultimate issue in both allegations is the same: whether the Respondent filed the lawsuit for reasons that are unlawful under the Act. The language of the lawsuit itself indicates that, by filing the lawsuit, the Respondent retaliated against Pace's protected concerted activities and attempted to enjoin him, inter alia, from filing unfair labor practice charges or giving testimony under the Act.[3]

[1] Index No. 96/114523. As noted by the judge, the Respondent voluntarily dismissed this lawsuit with prejudice on November 18, 1996.

[2] Chairman Hurtgen does not pass on whether the lawsuit was baseless, i.e., without even a colorable basis. In his view, that is the standard to be used to determine whether an ongoing lawsuit is to be condemned as unlawful. See *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731, 743–744 (1983). Where, as here, the lawsuit is over and the plaintiff-Respondent has not prevailed, the issue is simply whether the lawsuit is in retaliation for the exercise of a Sec. 7 right. Id. at 747.

[3] The lawsuit alleges that Pace

> has filed, caused to be filed, or conspired with others to have filed with several administrative agencies, seven charges against GMC: six National Labor Relations Board charges and one charge with the New York State Division of Human Rights. Pace has also recently threatened to file further administrative agency charges against GMC. In addition, Pace has filed four grievances against GMC with International Brotherhood of Teamsters Local Union No. 272, his union representative; has filed charges against GMC with the International

Moreover, it is clear that the issue of the Respondent's purpose in filing the lawsuit was fully litigated. Indeed, the Respondent does not claim that the matter was not fully litigated; and we can discern no reasonable way the Respondent could have done so, in light of the close factual and legal parallels between the 8(a)(4) and (1) violations. In arguing against the appropriateness of finding an 8(a)(4) violation, the Respondent relies solely on the absence of an 8(a)(4) allegation in the complaint. As shown, the law is that such absence is not necessarily fatal to the finding of a violation.

REMEDY

The traditional remedy awarded by the Board in cases where an employer has filed a baseless, retaliatory lawsuit is an order requiring the employer to reimburse the targeted employee for all legal and other expenses incurred in defending against the lawsuit, with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). See *Teamsters Local 776 (Rite Aid Corp.)*, 305 NLRB 832, 835–836 fn. 10 (1991), enfd. 973 F.2d 230 (3d Cir. 1992), cert. denied 507 U.S. 959 (1993); *BE & K Construction Co.*, 329 NLRB 717 (1999).

The reimbursement remedy is a make-whole remedy for filing and maintaining state court lawsuits in violation of the Act. The remedial order is designed to restore the status quo ante and to make whole the party who had to defend against an unlawful legal action. *Teamsters Local 776 (Rite Aid Corp.)*, supra. Accordingly, we find no merit in the Respondent's exceptions contending that the Board's reimbursement remedy, in cases such as this one, is an extraordinary remedy which must be pled in the complaint or during the hearing, and that the General Counsel bears the burden of demonstrating the necessity for the remedy.

We shall order the standard reimbursement remedy here.[4]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Garage Management Corporation, New York, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

"(a) Initiating a baseless lawsuit against employees in retaliation for their protected concerted activities and for filing charges or giving testimony under the National Labor Relations Act."

2. Add the following as paragraph 2(a) and reletter the subsequent paragraphs.

"(a) Reimburse Gordon Pace for all legal and other expenses incurred in the defense of the Respondent's August 12, 1996 lawsuit (Index No. 96/114523), with interest."

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT initiate a baseless lawsuit against you in retaliation for your protected concerted activities and for filing charges or giving testimony under the National Labor Relations Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL reimburse Gordon Pace for all legal and other expenses incurred in the defense of the Respondent's baseless and retaliatory lawsuit, with interest.

GARAGE MANAGEMENT CORPORATION

Judith Anderson, Esq., for the General Counsel.
Donald Savelson and *Michael Lebowich, Esqs. (Proskauer Rose LLP),* for the Respondent.
Arthur Schwartz, Esq. (Kennedy, Schwartz & Cure), New York, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge**.** Based on a charge and an amended charge filed on August 19 and September 26, 1996, respectively, by Gordon Pace an individual (Pace), a complaint was issued against Garage Management Corporation (Respondent or GMC) on April 13, 1998.

The complaint alleges essentially that Respondent engaged in discriminatory action against Pace in violation of the Act. Pace was a member of Local 272, Garage Employees Union, International Brotherhood of Teamsters (the Union).

Specifically, the complaint alleges that on August 12 and 20, 1996, Respondent filed state lawsuits against Pace which alleged that various activities engaged in by Pace, including the filing of grievances with the Union against Respondent; the filing of charges with the Board and with the Union election

Brotherhood of Teamsters' Election Officer; and has also filed three NLRB charges against the Union.

[4] Chairman Hurtgen concludes that the same remedy would obtain, even if the lawsuit were only unlawful under Sec. 8(a)(1).

officer; acting in concert with other employees in connection with an OSHA investigation; assisting another employee in filing a complaint with the NYS Division of Human Rights; and assisting another employee in filing a charge with the Board, constituted an abuse of process. The complaint alleges that the lawsuits were filed because Pace engaged in the above activity.

The complaint further alleges that Respondent discharged Pace on August 19, 1996, because he engaged in the above activity, and other union activities, and because he filed charges and gave testimony under the Act.

Respondent denied the material allegations of the complaint, and during the hearing was permitted to amend its answer to assert the affirmative defense that Pace was a statutory supervisor within the meaning of Section 2(11) of the Act. On August 10–13, 26–28, September 8, and 15–18, 1998, a hearing was held before me in New York City.[1]

On the evidence presented in this proceeding, and my observation of the demeanor of the witnesses and after consideration of the briefs filed by the General Counsel and Respondent, I make the following.

FINDINGS OF FACT

JURISDICTION

Respondent, a New York corporation having an office and place of business at 124 East 63rd Street, New York City, has been engaged in the management and operation of various parking garages, including the Riverview Garage, in New York City. Annually, Respondent derives gross revenues in excess of $500,000 from its business, and during the same period of time, purchases and receives at its facility goods, supplies, and materials valued in excess of $5000 directly from points located outside New York State. Respondent also admits, and I find that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

The Alleged Unfair Labor Practices

Background

Respondent operates about 60 parking garages in Manhattan. Of that number it owns 15 to 20 garages, which it also manages, it manages between 5 and 10 garages which are owned by others, and leases about 30 other garages which it manages. Approximately 350 employees work in its garages.

Respondent's officials include Richard Chapman, its owner, Gordon Hamm, its president and director of operations, and personnel director, Douglas Kamm. Kamm hires employees and disciplines them by issuing warnings and suspensions. Decisions to discharge are sometimes made by Kamm without obtaining the approval of Chapman or Hamm, but in other cases, all three officials play a role in making the decision.

Field or regional supervisors report to Kamm. The field supervisors are responsible for the overall operations of various garages assigned to them. They visit the garages periodically to check on their operation. Each garage has a manager, an assistant manager (foreman), relief or night foreman, and attendants, all of whom are members of the bargaining unit and represented by the Union or Local 32B, Service Employees International Union, AFL–CIO (Local 32B). The employees of the Riverview garage are represented by the Union.

The Riverview garage has 12 floors in 2 buildings: 8 floors in 1 building, and 4 floors in another. The 2 buildings are connected by a walkway on the main floor. The cars are moved to the various floors by 3 elevators. Both monthly, and transient customers park in the garage.

Gordon Pace

Pace was employed for 7 years for Respondent during all of which time he worked in the Riverview garage. He worked the night shift from 5 p.m. to 2 a.m., 5 days per week. Pace testified that he was employed as a foreman, which was the same as an attendant, in which his duties were to park and retrieve cars. In the last 2 years prior to his discharge he worked as a relief foreman, also called night foreman, or assistant foreman 2 nights per week on Sunday and Monday. During the remaining 3 days per week he worked as an attendant.

Respondent asserts that as a relief foreman Pace possessed and exercised supervisory authority sufficient to warrant a finding that he was a statutory supervisor within the meaning of Section 2(11) of the Act.

The Supervisory Issue

During the daytime hours the garage was managed by a manager and a foreman. At night the relief foreman was in charge. The manager's shift ends when the relief foreman comes on duty.

At the start of Pace's shift, at 5 p.m., the shift of the garage manager, Ismael Berrios, was ending, and he would leave the premises. His supervisors Hendrick Reynolds and Richard Frohnoefer, although not on the garage premises, were on duty in the evening and were available by beeper to assist if any problems arose.

During his shift Pace worked with three other employees. At 8 p.m. one employee ended his shift and at 11 p.m. another worker left, leaving Pace with one other employee until the end of his shift.

In addition to his regular wage rate Pace received additional pay called extra compensation (EC) of $200 per month, for his work as a relief foreman.

The following narrative refers to Pace's work as a relief foreman.

According to his testimony Pace was in charge of the operation of the garage. He was responsible for all moneys collected, recorded how many transient tickets were issued, signed up new monthly customers, later changed to state that if a prospective monthly customer came when he was a relief foreman, he would advise them to speak to the manager the next day, and

[1] The hearing was opened before Judge Eleanor MacDonald. Upon motion, she recused herself on the ground that her late husband had been a monthly customer at the Riverview Garage, the location of the dispute, and that customers with whom she may be acquainted may be called to testify.

Judge Raymond Green substituted for Judge MacDonald. Upon motion, he recused himself on the ground that his son, an attorney, was associated with the law firm which represented Respondent and filed the state lawsuits against Pace.

would make the same referral when working as a regular attendant. Pace processed claims of damage to vehicles, "constantly check the operation of the garage," ensures that customers' calls that their cars be ready in the morning are noted on the blackboard, and tell employees to retrieve certain cars at certain times. However, Pace later testified that no one has a specific responsibility to make sure that all customer requests written on the board are completed on the night shift, because everyone works together. He added that an employee or relief foreman may try to bring a car down to the main level if necessary, but that all employees work together as a team in completing their work. He also noted that if a car is listed on the board as being requested, they attempt to put in an easily obtainable location for the day crew. If they cannot do so because of overcrowding, the car is not moved. He also noted that it is the responsibility of the attendant who relieved him on the overnight shift to see that the cars listed on the board are easily accessible for the morning's rush.

Pace testified that if there was a problem or complaint concerning his working conditions he would speak to garage manager Berrios, even though he was not present in the garage during Pace's working hours.

Regarding dinner breaks, Pace stated that employees knew, automatically, when to take such breaks—according to their start times. Thus, if an employee begins work at 3 p.m., he would take a dinner break after 4 hours. Pace further stated that employees arrange among themselves when they would take breaks, rotating their breaks, or on occasion taking their breaks at the same time. Pace stated that it was left to the discretion of the employees as to when they would take their breaks, and that even if the garage was very busy, an employee could leave on break, adding that some employees waited to take their break until the work slowed down, and others just left. Pace noted that he "could not say anything about it."

Pace further stated that if 30 cars were lined up to enter the garage, and an employee wanted to take his break, he could not tell the worker that he could not take a break at that time.

Pace never recommended that any employee be hired or disciplined, and he never hired anyone.

Employee Miguel Matos worked the same shift as Pace. He began work for Respondent in 1989 and transferred to Riverview late 1995. He received no training when he began work at Riverview since he knew his basic responsibilities from his work at the other garage. If he had any questions he asked his coworkers, including Pace.

Matos' responsibilities included collecting money and tickets from customers. Prior to the end of his shift, he gave them to the person in charge, either Pace or Foreman Hernandez. He requested vacation time from Berrios. He never received permission from Pace.

Matos stated that the manager and supervisor prepare the weekly schedule which lists the hours to be worked by him. If Matos sought a change from that schedule he spoke with the manager. If Matos expected to be late, or was out sick, he was required to call 3 hours before the start of his shift, and the manager would arrange for a substitute.

Matos also stated that a foreman could ask an employee to work overtime, but the worker was not obligated to perform such work. If the employee agreed to work overtime, the foreman informed the supervisor. Matos noted that on a few occasions, the foreman asked an employee to work overtime, but the supervisor advised that he wanted a different person to work.

Regarding meal breaks, Matos stated that breaks are taken when circumstances permit, depending on the volume of work to be done. He stated that he does not need permission to take his meal break, or to leave the garage and buy his lunch, adding that if he has worked 4 hours he is entitled to take his lunch break at any time. He and his coworkers decide when they would take their lunch. If work was slow, they took their break at the same time.

Estela stated that a meal period is not provided by Respondent, but that the workers take 5 to 10 minutes to buy food at a local store. Estela stated that he did not take any breaks when he worked the night shift.

Alexander Casasola worked with Pace on Sundays when Pace was the relief foreman. Casasola stated that Pace collected cash and stood outside the garage and smoked. When Pace was busy another attendant collected the cash and gave it to Pace. Pace held the money until the end of the shift and made a deposit.

Casasola stated that Pace did not move cars often, but that he occasionally did so when he was not busy and the other attendants were busy.

Casasola stated that he was not "really" given directions by anyone in the garage. If an employee had difficulty retrieving a car, he would call on the intercom, and request assistance in moving other cars so that he could access the car requested. Any employee could answer the intercom and advise the caller.

Casasola further stated that Pace did not set his hours, did not tell him when he could take vacation, both of which were arranged by the manager. Requests for a change of shift were addressed to the manager, who he went to during the day even though Casasola was employed at night.

Charles Wigfall worked with Pace. He stated that Pace was supposed to tell the employees where to put the cars and was in charge of collecting the money from customers. He stated that Pace was actively involved in retrieving cars. Sometimes he would leave the area in front of the garage 15 times per shift to get the vehicles. At such times other employees would collect money from customers and direct their entry and exit from the garage.

Wigfall stated that on Sundays Pace parked cars on the main floor, and did not use the elevators because when he was in charge he wanted to remain on the main floor. However, if a customer requested a car on an upper floor, either Pace or another employee would retrieve it. In his absence other employees would service waiting customers. Any employee collected money if tendered by the customer and turned it over to Pace.

Wigfall stated that the employees on his shift arranged the cars by order of the time they were scheduled to be retrieved the following morning. All employees decided where to park the cars, and they worked as a team in that effort.

There was evidence that Carlyle Smartt, the night foreman at the 57th Street garage, a location which serviced and housed National Car Rental vehicles, in addition to performing many of the same duties as Pace, such as parking cars, collecting

money, giving tickets to parkers, instructed the three employees on his shift as to how many National cars had to be prepared, and who would clean the garage.

He told the workers when they could take their breaks, and stated that employees could not take breaks without asking his permission.

Smartt trained new employees by telling them what to do, and how the garage was run. Supervisors asked his opinion of the new employee, and Smartt gave his oral evaluation of them. Smartt has told a supervisor that he could not work with a new employee, and he should remove him from the premises because he could not drive, or damaged a car. The supervisor came to the garage and spoke to the employee before transferring him, asking him what happened and what the problem was. The employee was then transferred to a different garage. Smartt could not recall such an instance occurring in 1995 or 1996.

Ismael Berrios, the manager of the Riverview garage, was responsible for reconciling the daily reports which included preparing a report of the number of tickets issued and the money collected. Berrios stated that he told the men where to park the car, which car to retrieve, and what areas of the garage needed to be cleaned. Berrios noted, however, that when he is in charge, the attendant takes the car and parks it without instruction since he knows, based on his work in the garage where there was room for the vehicle. Berrios also stated that he also would give the customer a ticket, and assign an employee to park it. He conceded that he does not stay in one area and tell employees what to do, and that if he was busy, the attendant would take care of the customer without instruction as "they knew what to do." If a car entered the garage, and he and other employees were present, one of the employees would park it, either by assignment from Berrios or would do it on his own. If the garage is busy Berrios will park cars on the main floor but as a rule he just moves them into the garage away from the entrance so more cars can enter. He also noted that the entire crew, including himself, works as a team in parking the cars. Whoever is available, including himself, when a car enters will park it.

Berrios noted that he occasionally leaves the main floor to go to the upper floors, either to check a car which was damaged, to retrieve a car if other workers were busy, or to check the garage.

Regarding training of new employees, Berrios testified that he conducts the orientation, telling the recruit what his work consists of. Either he or the relief foreman assigns the new recruit to work with an experienced employee, who explains garage procedures and tells the employee how to park the cars. He stated that the new employees were "basically trained" by the most experienced employees in the garage. He also noted that he and the night foreman evaluate the new employee by answering questions of the supervisor as to how the employee was performing. Berrios conceded that the supervisor also asks other employees the same question. Following the evaluation, Berrios gives his opinion as to whether the employee was capable of parking cars, and his recommendation is followed by the supervisor.

Berrios stated that the manager or the foreman decides who would take their breaks when the garage was busy, but then stated that the crew knows when the busy period is, and he "does not really have to tell them to take a break," but nevertheless they ask permission to take a break, which he approves. He stated that employees cannot simply walk away and take a 5 or 10 minute break. Breaks are taken only when the garage is not busy.

Stephen Denaro, the field supervisor who was employed in the evenings, testified that the night foreman was in charge of the garage, and could require an employee to work overtime if the garage was busy. He stated that a night foreman's decision to have an employee work overtime does not have to be approved ahead of time by him, adding that he is usually notified after the fact. He further stated that if an employee calls in sick, the night foreman has the authority to tell an employee to work overtime, however the foreman could not require the worker to stay later. If the employee refused the foreman requests the supervisor to obtain a replacement and the supervisor would obtain an employee from another garage.

Denaro further stated that if an employee causes minor damage to a car, and the customer offers to waive his right to file a claim in exchange for not paying the parking fee, the night foreman has the authority to permit the customer to leave without paying. In addition, if a customer was short $2 or $3 on a $21 parking fee, the foreman is authorized to permit the customer to leave without paying all he owed. The foreman or even an employee could also call the supervisor and ask his permission, but for $1 or $2, the foreman would not call. Denaro noted that he would expect to be called if the amount sought to be waived was $5. Generally, Denaro goes to the garage after the customer left and approved the transaction.

Denaro stated that the night foreman reports to the manager, and has fewer duties than the manager, who does vacation scheduling, and checks employees' timecards.

Denaro stated that the night foreman trains new employees and informs the supervisors as to their performance. The night foreman shows the new employee where to park the cars, how to park them, how to speak with customers, and informs them as to company policies, and safety issues, and when to take breaks. Denaro has acted on their evaluations by terminating a new employee and transferring them to a different garage which was not as busy. Denaro noted that generally, the night foreman will remain on the main floor, but occasionally goes to an upper floor if necessary. He conceded that if the new employee needed help on an upper floor, other employees advise them as to garage procedures. Denaro personally asked a night foreman how a new employee was working out.

Denaro further testified that the night foreman assigns particular times for employees to take breaks, which can range from 15 minutes to 1 hour.

John Incandela, Respondent's regional supervisor who was responsible for Riverview and other west side locations, testified that the manager, Berrios, is ultimately responsible for the garage 24 hours per day, 7 days per week, regardless of whether he is present.

Incandela noted that only the relief foreman is supposed to handle cash, not the attendants. His statement that similarly

only the manager may take cash payments was contradicted by Berrios and other employee witnesses who stated that employees accept cash, but then turn it over to the manager or relief foreman.

Incandela stated that if a new employee is assigned to the night shift, the relief foreman is responsible for his training. In deciding whether to retain the new worker, he asks the relief foreman whether he is performing well, whether he needs more training, and whether he should be retained. Incandela stated that he relies, to a 90 percent extent, on what he is told the relief foreman. He conceded, however, that he also asks other employees how the new employee is working out.

Douglas Kamm, Respondent's director of personnel, testified that he spoke with relief foreman regarding the performance of new and long-term employees. He stated that inasmuch as there is a 60-day probationary period, he is anxious to determine, prior to the end of the probationary period, whether the employee should be retained. Accordingly, if the employee works at night, he speaks to the relief foreman and is told about the employee's attendance record, whether he took extended breaks, and occasionally would make a recommendation that the employee be dismissed. Kamm said that if the relief foreman could not give a positive recommendation, Kamm would be inclined to discharge the employee. In addition, Kamm has acted on a relief foreman's assessment that an employee was basically performing well, but could not keep up with the demands of a busy garage. On those occasions, the relief foreman would recommend that the new employee be transferred to a less busy garage, and Kamm would approve that recommendation and move the employee.

Pace's Union Activities and Activities in Behalf of Employees

Pace was a member of the Union. In January 1996 he began a campaign for election as international delegate, and was elected. Pace ran for union office in April 1996 and again in December 1996 after his discharge. He was a candidate on the rank and file unity slate, which ran in opposition to the incumbent union pride and power slate.

The Grievance of May 19, 1995

A warning notice dated May 11, 1995, named five members of the Riverview crew: Drayton, Hernandez, Matos, Pace and Sas. It stated that the violation, which occurred "through May 10," was that numerous reports of items missing from customers' cars had been received during the past 30 days. The warning stated that it was a final warning, and that an investigation of the incidents would continue, and that the employee or employees responsible for these incidents would be terminated.

Pace testified that he first learned of the warning from Union Agent Adrian Merced, on about May 15. Pace called Raul Coronado who ran for union office on Pace's slate. Coronado advised Pace to file a grievance. Pace told Drayton that he should file a grievance, and told Matos and Sas that Coronado advised such action.

On May 19 Pace filed a grievance against Respondent, alleging that it harassed him by making false accusations of theft.

Pace testified that 2 months went by without any action being taken by the Union. He was advised by Coronado to file a charge. On July 19 he and Matos filed separate charges against Respondent and the Union. Pace assisted Matos in the filing of the charge. Pace filed the charge because the Union had not proceeded with his grievance. Each charge alleged that Respondent harassed each of them and other employees having more seniority, and that it enforced plant rules more strictly against each of them than against other employees. Pace's charge also alleged that Respondent threatened to retaliate against him because of his union activities in behalf of the rank and file unity slate.

A grievance meeting was held, presumably after the charge was filed and it was agreed that the warning notice would be withdrawn. Respondent stipulated at the hearing that it was withdrawn as to Pace only.

Pace's Activities in Behalf of Worker Safety

An OSHA investigation of the Respondent's facilities was begun in January or February, 1995.

On about December 25, 1995, Pace sent to Respondent a "notice of intent" to cooperate with OSHA's investigation. In the letter he stated that Supervisor Morrison Banner informed employee Miguel Matos that he would be transferred from Riverview. Pace stated that that transfer, and other unspecified actions of Respondent were attempts to "feret out and coerce" employees who Respondent believed cooperated with OSHA's investigation.

Pace prepared and sent to Respondent notices of intent for employees Luis Estela, George Hernandez, and Matos which stated that they intended to cooperate with the OSHA investigation. Pace stated that by December 1995 he believed that Respondent had undertaken a "program" to identify employees who it believed had cooperated with the OSHA investigation. He conceded that although Matos and Hernandez were two such identified employees, they continued to be employed by Respondent at the time of the hearing. Pace further stated that he was not told by Respondent that he would be discharged if he cooperated with OSHA, nor was he told that employees should cooperate with the investigation.

Pace was present when Hernandez gave an affidavit to an OSHA investigator, and he spoke to Estela several times about cooperating with the investigation.

The Grievance of January 16, 1996

In early January Pace received 3-1/2 hours overtime pay although he worked 5 hours during the period involved. He asked Manager Berrios about it, and was told that Supervisors Incandela and Frohnoefer were responsible for the calculation. Pace did not ask them or Kamm to look into the matter, but instead filed a grievance on January 16, which alleged that Respondent had "illegally reduced my earned wage. . . ." He attributed the reduction in his pay to discrimination since at the same time, a coworker had worked 4 hours overtime, and parked his car in the garage and had not suffered a reduction in his pay. Pace had also parked his car in the garage and believed the deduction was made for that reason. His reason for not inquiring was that his supervisors and manager were hostile toward him at that time.

Following a grievance meeting, Pace received the amount claimed.

On January 17 Pace filed a complaint with OSHA claiming that the reduction in his pay was discriminatory. He testified here that he believed that Respondent was retaliating against him because it believed that he was a witness in the OSHA investigation. OSHA dismissed or deferred his charge.

Personnel Actions Against Pace

The Warning of January 26

On January 26, 1996, Pace was issued a warning for conducting personal business on company property, unauthorized solicitation on company premises, and for failure to pay for parking while soliciting. This warning grew out of Pace's campaigning for delegate in other garages.

After receiving this warning Pace filed a notice of protest with Barbara Zack Quindel, the Teamsters election officer, objecting that Respondent and the Union were preventing him from campaigning in the upcoming international delegate election. Quindel determined that Respondent violated the rules which governed campaigning in the Teamsters election by issuing a warning to Pace for conduct which had been engaged in by union officers. Respondent agreed to withdraw the warning notice.

Pace also filed an unfair labor practice charge, Case 2–CA–29126 on February 15, 1996, alleging that Respondent's actions restrained his right to engage in union activity. He stated that he filed the charge because of the warning he received. Pace ultimately withdrew the charge.

Respondent argues that Pace filed the charge in bad faith because of Quindel's statement in her decision that Pace parked his car where it "normally would have required a ticket," and accordingly, the warning was valid when issued. It asserts that the warning was a valid warning, and indeed, Pace testified that he was "vaguely aware" of rules prohibiting the parking of the attendant's personal car in a garage without the approval of a supervisor, and distribution of literature on company property.

Pace helped Matos write a charge, which was filed on May 30, 1996, which alleged that Matos had been illegally transferred.

Pace testified that Estela told him that an OSHA investigator suggested that he file charges of sexual harassment with the NYS Department of Human Resources concerning Manager Berrios. In late June 1996 Pace accompanied him to that office, helped interpret for him, and assisted in his filing charges there.

Disciplinary Actions Concerning Discourtesy to and Abuse of Customers

The Warning of February 6, 1996

John Incandela, Respondent's regional supervisor testified that in January 1996 he received complaints by customers that their cars were left "buried" behind other cars when they sought to obtain them in the morning. As Pace was working the night shift, he was responsible to make sure the cars were available for the morning shift.

As a result, Pace was issued a warning notice on February 6, which stated that it was a "final warning—continue to fail to perform this basic job duty will result in termination or transfer." Incandela was asked by Riverview Garage Manager Berrios to speak to Williams, a monthly customer. Williams told him that several times his car was not available, having been "buried" behind other cars.

Pace was issued another warning notice that day, noting that although he had promised a customer that he would "boost" his battery, he did not do so, requiring the customer to seek help in the morning. Kamm explained that Respondent's policy forbade the boosting of car batteries, but this "final warning" was issued because it was considered discourtesy and a lack of response to a customer to promise to perform a service, and then not do it.

Pace denied receiving that final warning on the date it was issued, or having discussed it with any management personnel. Rather, he stated that he received it at a union grievance hearing more than 7 months later, in late September 1996 after his discharge.

However, Kamm testified that he gave the warning to Incandela to give to Pace. Incandela testified that he gave the notice to Field Supervisor Richard Frohnoefer, who later informed Incandela that he tendered it to Pace, who refused to accept it. Frohnoefer testified that he offered the document to Pace, who said he knew exactly what it was, refused to take it, and walked away. Frohnoefer left it on the desk. I credit Respondent's witnesses. In view of Pace's admitted refusal in June 1996, to accept a certified letter on the ground that he was not expecting such a letter and did not know who sent it, it is quite believable that Pace would refuse to accept the warning letter.

The question, of course, is not whether Pace received it, but whether it was issued for cause, and whether Respondent was entitled to rely on it in making its decision to discharge Pace. The answer is yes, in each case.

The Warning of June 20, 1996

Respondent has a rule that patrons must call in advance in order to obtain their car. Monthly customer Hany Alexander testified that she entered the garage on June 2, 1996, a Sunday afternoon and asked for her car without calling in advance. Pace told her that that was the second time she did not call for her car, and that the next time he would not retrieve it. She observed that at that time, 4 employees were sitting down and not working, and Pace was smoking and apparently did not want to be disturbed. She left and took a taxi.

Mrs. Alexander's husband called Respondent's officials and complained, and she then wrote a letter of complaint which was consistent with her testimony. Her letter stated that "a person like Pace should not be permitted to work with the public. If this problem is not corrected, I will have to move my car to another parking company, who will provide more pleasant workers."

She added that usually she calls ahead of time for her car, but was not aware that she had to call 1 hour in advance, as advised by Pace. In the past, when she requested her car without calling, Pace told her to wait a few minutes, and would get the car.

On June 20 Kamm sent Pace a letter which stated:

> In recent weeks, the company has received several complaints from customers at the Riverview Garage citing problems with the service provided in general by the night

> crew and by you specifically. Customers mentioned "rudeness, indifference and lack of responsiveness", among other things, in their letters and or calls.
>
> We are currently investigating these complaints further to determine their seriousness but in the meantime, please be aware of them and make an immediate effort to turn things around.
>
> Please call me if you have questions.

This letter was sent by certified mail. Pace did not claim it at the post office because he was not expecting a certified letter and did not know the sender. One month later on July 18 the letter was attached to Pace's paycheck, and he received it at that time.

On July 22 Pace called Kamm and asked for the names of the customers referred to in the letter. Kamm refused to supply the names, and Pace filed a grievance that day. He received a grievance hearing date of August 22, but was discharged the day before.

In mid July, the rear of customer Stanley Royce's car was badly damaged. He complained to Manager Berrios, and eventually sent a letter dated July 22 regarding the damage.

Royce's car was damaged following his leaving it to be parked in the garage. Royce testified that he believed that Pace parked the car that day. Royce wrote that "the conduct of Mr. Pace continues to be unacceptable. It appears he simply does not care about complaints or questions from customers. I have questioned him about damages to my car that appeared the night he parked my car, at which time he was rude to the point of abusive in denying any responsibility. Rather than discuss the damage to my Jaguar, he stated 'I don't damage cars' and walked away. Later when questioned further he blamed the damages on employees 'not making enough money.' Paying $5,000 a year to park, I do not believe I should resort to bribing people to show care for my car. With a crew of good people it is a shame that 1 can bring the operation down."

Royce's testimony was consistent with his letter. However, he stated that Pace "was not really rude to me," adding that he was "abrupt, to say the least" at times. He noted that when he first questioned Pace about the damage, Pace told him "look, I didn't damage the car" and "walked off".

At hearing, Pace stated that when Mrs. Alexander came for her car, he asked his coworkers if her car was on the main floor. They did not see her car. Pace asked if she called for it. She said no, but that she came in earlier that day and told an employee that she would be going out. Pace looked for her name on the list, but could not find it. He questioned her closely: "Who did you speak to?" She said she did not know. He asked for a description of the worker, and she replied that she did not remember. Pace then said that she spoke to someone but her name was not recorded. She then "stormed out." Pace denied telling her that this was the second time she did not call for her car and the next time he would not give it to her.

As to Royce, Pace testified that Royce asked him in an "agitated manner" who damaged his car. Pace was working at the time, moving cars. Pace stated that he interpreted the question as an accusation that he (Pace) had damaged the car. Pace replied "I don't damage cars." He said that later, when Royce "calmed down," Pace explained that the damage may have been due to the fact that there are too many "B" employees, and new hires with little experience.

The Abuse of Process Lawsuit Against Pace

Respondent filed a lawsuit against Pace in New York State Supreme Court. The suit, dated August 12, 1996, and bearing index no. 96/115024 seeks injunctive relief and actual and special damages "arising from Defendant's abuse of process and prima facie tort of intentionally and maliciously using civil process to harass GMC."

The lawsuit alleges, inter alia, that from July 1995 through July 1996, Pace:

> has filed, caused to be filed, or conspired with others to have filed with several administrative agencies, seven charges against GMC: six National Labor Relations Board charges and one charge with the New York State Division of Human Rights. Pace has also recently threatened to file further administrative agency charges against GMC. In addition, Pace has filed four grievances against GMC with International Brotherhood of Teamsters Local Union No. 272, his union representative; has filed charges against GMC with the International Brotherhood of Teamsters' Election Officer; and has also filed three NLRB charges against the Union.

The lawsuit discusses the individual charges filed, and stated that Pace knew that the charges and grievances had no merit, Pace did not appear for hearings on the grievances, and that a charge was withdrawn by Pace. The lawsuit further alleges that Respondent was specially damaged since it was required to obtain counsel to defend the charges.

Respondent sought an order "restraining, prohibiting, and permanently enjoining Pace from filing charges against GMC and against his conspiring with and encouraging other employees to file similar charges against GMC." The suit sought compensatory damages and special damages of $4620 for the cost of retaining counsel.

On November 18, 1996, Respondent and Pace stipulated that Respondent voluntarily dismissed the complaint with prejudice.

The Temporary Restraining Order Against Pace

At the same time that he was given the termination notice on August 21, Pace was also served with an order to show cause and temporary restraining order. Respondent had also filed that lawsuit in New York State Supreme Court. It was dated August 20, 1996, and bears index no. 96/115024. It alleges that it was brought because of Pace's "intimidation of, harassment of, and threats of physical violence against GMC and its employees."

In the lawsuit Respondent repeated certain of the allegations in the abuse of process complaint, adding that Pace "used civil process in a perverted manner in order to obtain a collateral objective, to harass GMC and intimidate it from properly supervising GMC's employment-related activities."

This suit, which contained supporting affidavits, alleged that Pace threatened to kill Respondent's officials, and sought an order restraining and enjoining Pace from threatening or committing violence against Respondent's officials or employees, and appearing at any of Respondent's facilities.

In October 1996 Respondent and Pace stipulated that Respondent voluntarily dismissed the lawsuit with prejudice, and that the temporary restraining order was dissolved.

The Discharge

Article XIX 1.F. of the collective-bargaining agreement provides that "no employee may be . . discharged . . . except for cause. Just cause may include abuse of or discourtesy to customers."

Respondent's rules and regulations states that "abuse of and/or discourtesy or lack of response to customers," among other violations "are such a threat to our ability to stay in business that a violation *will* result in immediate termination of employment." (emphasis in original)

Pace reported to work on August 21 and was given a termination notice. It stated that he was discharged for violating article XIX 1.F. of the collective-bargaining agreement—"continued/repeated abuse of and/or discourtesy to customers," and notes the dates of violations as being "through August 5, 1996." The text of the notice states:

> After having received a warning letter addressing the above on 7/18/96, employee has continued to be discourteous and/or abusive to customers, as attested by specific complaints from customers to manager and head supervisor, singling out above employee specifically.

Pace stated that Kamm, who gave him the termination letter, said that he had received complaints from customers that he was rude, and he had been on "final warning" for this matter. Pace denied receiving the July 18 letter referred to in the discharge letter, but of course that refers to the June 20 letter which Pace refused to accept, and which was attached to his paycheck on July 18, which he admitted receiving.

Kamm testified that service to customers is of great importance in the garage industry in general, and to Respondent, specifically. Respondent has a large number of monthly customers who, at least at Riverview, pay over $400 per month to park their vehicle. Accordingly, Respondent stresses to its employees the importance of keeping those customers satisfied. Respondent has a procedure in which such complaints are investigated promptly and handled by the garage manager, supervisor, or Kamm. It is important to remedy such complaints since customers may leave the garage, or the owner of the garage may cancel the contract with it.

Kamm testified that he and other corporate officials made the decision to discharge Pace because of his "repeated abuse and discourtesy" to customers of Respondent. Kamm stated that the decision was based on "repeated incidents" reported by customers, supervisors, the garage manager, and following a warning for the same misconduct. Kamm testified that Pace's discharge was effected because of his "cumulative record of abuse and discourtesy" of customers."

Kamm also stated that his decision to discharge Pace was further based on being told by Incandela that his (Incandela's) July 1996 surveys of customers at the Riverview garage indicated that Pace was discourteous and nasty. Incandela testified that he received more than four negative comments concerning Pace.

Kamm denied that Pace's union or concerted activities had a role in the decision to terminate him.

Kamm noted that he had the option of suspending and even discharging Pace, according to the contract's terms, even at the first instance of customer abuse. However, he was retained and warning letters were issued in the hope that his performance would improve.

Evidence of Disparate Treatment

Abuse of and Discourtesy to Customers

The General Counsel asserts that Pace, a 7-year employee, has been subject to disparate treatment, in that other employees who have engaged in similar or worse conduct have been retained or transferred.

The collective-bargaining agreement in effect at the time of Pace's discharge, states that a warning notice shall be retained in the employee's file for one year from the date of the infraction. Kamm has only relied on warning notices which were up to 1-year old in making decisions to discipline employees. In addition, when considering discharge he has relied only on similar offenses.

In deciding on discipline, Kamm receives reports from his supervisors, usually by phone. Kamm reviews the employee's past record of discipline, and decides then, with the supervisor, what action to take against the employee. A warning notice, or corrective action form is completed, which is then sent to the Union and, occasionally the employee. The type of discipline issued is based on the nature of the misconduct, the prior record for committing the same offense, and the employee's length of service.

The evidence establishes that other employees have been discharged for abuse of, and discourtesy to customers.

Denzil Warner, a 12-year employee was given a final warning in August 1994 for abuse/discourtesy to a customer for speaking loudly and abusively to a customer. One month later, in September, Warner used profanity and was abusive and threatening to a customer. He was terminated. Upon informing the customer that Warner had been fired, the customer asked Kamm to reinstate him since she provoked the incident, and although he had been "impolite" she did not believe that his actions warranted discharge. Warner was reinstated after a 1-month suspension without pay. Eleven months later, Warner was discharged for "repeated discourtesy/abuse toward customers, co-workers."

In August 1994 Martin Gobbo, an 8-year employee, received a final warning for abuse and discourtesy to a customer. Two months later, in October, he was terminated for "continued willful abuse of and/or discourtesy to customers."

Anthony Pierre, a 9-year employee, was discharged in May 1995 for abuse and discourtesy toward customers. He had received a final warning for the same offense in August 1994. At that time, a customer complained that Pierre "went into a huff" when he gave him a $20 bill for a parking fee, and did not have smaller change. In May 1995 Pierre washed cars in violation of company policy, while ignoring waiting customers which was considered discourtesy toward customers, and was fired.

In October 1995 Raymond Magloire, a 13-year employee, was discharged, apparently his first offense, for "extremely

abusive" conduct including threats to a customer and cursing at him. The discharge was supported by a letter from the customer who stated that when he asked twice for his car, and told Magloire of the urgency, Magloire cursed at him and said he wanted to see the customer die.

James Hammonds, a 33-year employee who was covered by an agreement between Respondent and Local 32B, was the subject of several warnings for abuse of customers. His file contains letters of complaint from customers in December 1988 and February 1990, and warning notices in February and May 1990 for abusive treatment. The May 1990 notice suggested termination, another warning notice in November 1992 in which suspension and/or discharge was recommended, and finally, a final warning in March 1994 for "continuing abuse and discourteous behavior". Kamm wrote to a Local 32B official in May 1994 that "we have been extremely lenient with Hammonds in deference to his years in the garage but now have reached a point where his conduct can no longer be tolerated." The letter concluded that Hammonds had been terminated.

I reject the General Counsel's argument that Hammonds' case is an example of Respondent's tolerance of customer abuse. First, as testified by Kamm, the practice used with respect to employees represented by Local 32B permits Respondent to use offenses more remote in time to the current infraction, and also provides for more corrective actions, such as several warnings, a suspension and then a termination, than that utilized in the Local 272 procedure. In any event, in Hammonds' case, as with Pace's, abuse of customers was not tolerated, and both were discharged for the same misconduct.

There were several cases where a decision to discharge for customer abuse or discourtesy had been made, but then those decisions were withdrawn because the customer did not want the employee terminated, or a further investigation revealed that there was no merit to the complaint.

In August 1993 Levon McNeil, an 11-year employee, was given a final warning for being discourteous to a customer. This was the first incident of this nature. An investigation revealed that the customer was a girlfriend or relative of McNeil, and that their personal relationship played a part in the confrontation. The incident was not deemed to be sufficient to warrant immediate discharge.

Floyd Adams, a 19-year employee was terminated in April 1994 for abuse/discourtesy to a customer. However, 1 week later, Kamm was asked by the garage owner and the customer to rescind the termination, essentially because the customer was at fault. Adams was reinstated.

Carlos DaSilva, a 4-year employee received a warning notice in August 1994 for abusive conduct toward a customer, but the customer immediately withdrew her complaint, claiming that she was at fault for the incident. One month later, a customer complained about having to wait for his car. DaSilva received a 1-day suspension and final warning with a note regarding his "arrogant attitude" and lack of responsiveness to customers. Inasmuch as the first complaint had been withdrawn, this was considered his first complaint for such an offense.

In April 1996 a decision was made to discharge Milon Malave for abuse and discourtesy to a customer. Malave had been employed for many years by the Mutual Parking Systems, and had become employed by Respondent in 1994 when it opened a new garage. Following his termination by Respondent, Malave went to the owner of Mutual, Mr. Brownstein, who placed him in a garage owned by Mutual but managed by Respondent. Kamm acquiesced in this transaction because it was important to him to satisfy Brownstein.

In June 1996 a decision had been made to terminate Angel Collazo, a 5-year employee who worked alone on the overnight shift. It was alleged that he ignored customers by keeping the gate down. An investigation revealed, however, that Collazo had been in the building and could not hear the bell being rung. He received a 1-week suspension.

There were letters from two customers in the file of Eddie Doura, a 10-year employee, dated in September- 1992 and January, 1993, which complained of abusive and discourteous conduct. It was stipulated at the hearing that if certain managers testified they would state that the matter was investigated, and the letters were not substantiated, and not found sufficiently valid to warrant discipline.

Letters from Riverview customers were received following Pace's discharge, in which Pace was praised, and Respondent was asked to reinstate him. Other letters of praise following the discharges of other employees had been received from customers, but they did not cause Respondent's decision to terminate to be reversed. The only instances where decisions to terminate were reversed were where the customer who was the victim of the alleged abuse either recanted his accusation or requested reinstatement for the employee—which was not the case with Pace.

Other Misconduct

The General Counsel argues that disparate treatment is apparent in that more severe conduct than customer abuse or discourtesy has occurred, and employees have not been discharged for such conduct.

A serious problem occurred prior to 1995 and thereafter concerning employees operating the elevators with the doors open. Kamm termed it a "major safety problem." If the doors were left open a person or vehicle could fall into the open elevator shaft. In fact, during the OSHA investigation an employee had driven a car into an open elevator shaft, causing injury and extensive damage. It was found that employees had intentionally jammed or bypassed the elevator's interlocks, thereby causing the doors to remain open. The workers did this in order to speed the delivery of cars. Ordinarily, the employee would have to get out of the car to open the elevator door, and then once inside the elevator, would have to shut the door.

This was a common occurrence. Although the Respondent's rules provides for immediate termination for tampering with the interlocks and/or operating the elevators with the doors open, Kamm testified that the practice was so widespread that he could not discharge every employee who operated the elevators with the doors open.

Accordingly, Kamm adopted a policy providing for the termination of any employee found to have jammed the interlock or created a condition where the doors were left in an open position, but only issuing warnings to those who operated the elevators with the doors open. If it could not be proven that the

employee had jammed the interlocks, he was given a warning, and not discharged.

Pursuant to that policy, employees Tiber Sas and Carlos Campuzano were discharged in October and November 1995, respectively. Both admitted to bypassing or jamming the elevator interlocks. Employees Jose Aguirre, Fernando Alafero, Sam Cardenas, Donald Cicero, Robert Coello, Yancy Dixon, William Eamillie, Galliano, Rafael Garcia, Carlos Gieraldo, Acie Greene, Abe Haznedar, Alfred Inerhunwunwa, Victor Romano, Adolfo Sanchez, Carlyle Smart, Ken Smith, Joe Stallings, Diego Villavicencio, and Hans Zapata were given warning notices for operating the elevators with the doors open. At times, the whole crew was given warning notices, including the garage manager for permitting this practice to continue.

Respondent's actions toward other infractions of its rules was similar. It discharged employees for not remitting money received from customers, and altering a timecard which would result in the employee receiving money he was not due. It also discharged an employee for fighting with a coworker and for damaging a car.

ANALYSIS AND DISCUSSION

The Supervisory Issue

The last two collective-bargaining agreements, covering the periods 1989 through 1992 and 1995 through 1999, set forth the recognized unit as follows:

> Employees for whom the Union is recognized as the exclusive bargaining agent are Working Managers or Working Foremen, Washers, Floormen, Transporters, Cashiers and all other persons now or hereafter performing one or more of the functions of the said included classifications as hereinafter defined.

Accordingly, Respondent has historically recognized the classification in which Pace was working, either as garage attendant or relief foreman, as included within the bargaining unit, and nonsupervisory.

Section 2(11) of the Act provides:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The above listed powers are to be read in the disjunctive. The possession of one or more of the above powers does not establish that an employee is a statutory supervisor unless the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. It is the burden of the party asserting the supervisory status of an employee to prove such status. The Board has observed that, in enacting Section 2(11), Congress stressed that only persons with "genuine" management prerogatives" should be considered supervisors as opposed to "straw bosses, leadmen . . . and other minor supervisory employees." *Chicago Metallic Corp*., 273 NLRB 1677, 1688 (1985). "[T]he Board has a duty to employees . . . not to construe supervisory status too broadly because the employee who is deemed a supervisor is denied ... rights which the Act is intended to protect." *General Security Services Corp.*, 326 NLRB 312 (1998). The Board will not lightly find an employee to be a supervisor because such an employee loses his rights under Section 7 of the Act. *Adco Electric*, 307 NLRB 1113, 1120 (1992).

Applying the above principles to the facts in this case, I must conclude that Pace was not at any time a statutory supervisor.

Respondent argues that Pace possessed supervisory authority as a relief foreman when he relieved the manager. It should be noted that even the manager is included within the contractual unit. Significantly, Regional Supervisor Incandela stated that Manager Berrios was "ultimately responsible" for the garage 24 hours per day, 7 days per week, regardless of whether he was present. Pace, employed at night was admittedly "in charge" of the garage at that time.

Pace was responsible for the collection of money, checking the garage, making sure that cars were parked, and that customers' cars were available for the morning shift. He did not hire or fire any employees, or effectively recommend such action.

Respondent argues that Pace assigned employees their break times. Pace and Matos testified that employees knew when to take their breaks depending on the workload of the garage. Even assuming that Pace assigned their break times, such assignment was routine and regular, based on how busy the garage was at the time, and involved no independent judgment. Even Manager Berrios testified that he does not "really" have to tell employees to take a break and that they know when the busy period is. Pace's limited role, if any, in assigning employees to park cars does not require the exercise of independent judgment. *Greenhorne & O'Mara, Inc*., 326 NLRB 514 (1998).

The evidence established that the work that Pace performed, collecting money and parking cars, was the same as the other attendants. Relief Foreman Smartt's duties as relief foreman, cannot be compared to those of Pace. Smartt worked in a different garage which serviced rental cars, and he directed employees in their preparation. Pace was not involved in any such activities.

Regarding training of new employees, Pace was not involved in such activity. New employee Matos was not trained by Pace since Matos knew what the job involved.

Even concerning recommending discharge or transfer, Smartt's testimony does not support a finding that Pace possessed supervisory authority. Thus, Smartt's testimony that he recommended to a supervisor that an employee should be removed, was not automatically acted on by the supervisor. Rather, the supervisor visited the premises, and investigated the incident, including speaking with the employee before removing the employee.

Field Supervisor Denaro's testimony that the relief foreman has the authority to ask an employee work to overtime was undermined by his further testimony that the foreman could not require the employee to work overtime. His testimony that he acted on a relief foreman's evaluation of a new employee by

terminating or transferring the worker was not specifically related to Pace's authority or experience.

The above recitation of Pace's duties establishes that he does not possess, and has not exercised any supervisory authority. Assuming he has provided his appraisal of a new employee to a supervisor, there has been no evidence that he effectively recommended that anyone be removed, discharged or transferred. *Necedah Screw Machine Products*, 323 NLRB 574, 576 (1997); and *Lincoln Park Nursing Home*, 318 NLRB 1160, 1162 (1995). Even where an evaluation has been made, that evaluation is investigated by a supervisor who decided what action to take. *Amboy Care Center*, 322 NLRB 207, 212 (1996)

The evidence does not establish that Pace made assignments to employees. The most that can be said is that he told employees to retrieve certain cars and certain times. First, such assignments do not demonstrate the exercise of independent judgment. Customers call in to the garage the times they need to pick up their cars, and those times are recorded on a board in the garage. Thus, Pace simply tells the employees to get the cars requested. This is the exercise of routine, general authority typical of a non-supervisory leadman rather than true supervisory authority within the meaning of Section 2(11) of the Act. *North Jersey Newspapers Co.*, 322 NLRB 394, 395 (1996).

In *Diamond Parking*, 198 NLRB 239 (1972), a case involving parking lots, the Board held that garage managers who have attendants working under them are not statutory supervisors. The facts there are quite similar to this case:

> [A]ll the garage managers perform substantially the same work as the attendants. The attendants and garage managers park cars, collect parking fees, and check the garage to make sure that everybody has paid the fee. When a garage manager leaves work an attendant takes over. Two of the garage managers are paid the same as attendants. The garage managers routinely direct attendants to wash cars or pump gas. Only the district manager has authority to discharge employees, and the operations manager schedules the work, receives employee complaints, and is notified of absences.

Similarly, here the manager, relief foreman, and the attendants all work together in parking cars and collecting money. Any direction of the attendants by Pace is merely routine inasmuch as the employees, through their experience and the nature of the work, know exactly what has to be done.

I accordingly find and conclude that Respondent has not proven that Pace is a statutory supervisor.

The General Counsel's Prima Facie Case

Pace's Activities Were Protected and Concerted

As set forth above, Pace was extremely active in writing and filing charges and grievances, both for himself and in behalf of other employees, and writing for himself and other workers notices of intent to cooperate with OSHA, which were sent to Respondent. Pace also filed a complaint with OSHA and with the Union's election officer.

Pace unquestionably engaged in protected, concerted activities by his filing charges, grievances, and through the other activities set forth above. The filing of a charge is protected activity. *Summitville Tiles,* 300 NLRB 64, 65 (1990).

In *NLRB v. City Disposal Systems*, 465 U.S. 822, 840 (1984), the Supreme Court endorsed the Board's Interboro doctrine[2] which recognizes that an employee's "honest and reasonable invocation of a collectively bargained right constitutes concerted activity, regardless of whether the employee turns out to have been correct in his belief that his right was violated."

The Board has held that "it is well settled that the merit of a complaint or grievance is irrelevant to the determination of whether an employee's conduct is protected under the Act, so long as the complaint was not made in bad faith." *Wagner-Smith Co.,* 262 NLRB 999 fn. 2 (1982), or with malice. *Afro-Urban Transportation,* 220 NLRB 1371 (1975).

Respondent argues that such activities were not protected because Pace acted out of malice and bad faith in order to promote his personal goals and ambitions. Respondent asserts that Pace, who ran for union business agent with the rank and file unity slate, sought to show employees, through the filing of these actions, that the rank and file unity slate could do more to improve their conditions than the incumbent union leadership.

Respondent further notes that the charges filed with the Board by Pace in July 1995 and in March 1996 were dismissed following an investigation and another charge was withdrawn by him. In addition, the charge he filed with OSHA alleging retaliation for his cooperation with that agency was dismissed. "Charges before the Board are commonly withdrawn or dismissed, and such disposition is not tantamount to a finding that the charges have been filed in bad faith." *LP Enterprises*, 314 NLRB 580 (1994).

Not all of Pace's filings were dismissed or withdrawn. Pace's grievance concerning the deduction from his wages for parking resulted in Respondent's reimbursement for the amount deducted. Further, the Teamster election officer found merit in Pace's allegations that he was improperly denied the right to campaign for union office.

Pace's activities in filing charges, grievances, and complaining to OSHA and the Union's election officer constituted protected, concerted activities regardless of whether his charges, grievances, and complaints were correct. *Eastex, Inc*., 437 U.S. 556, 564–567 (1978); and *Systems with Reliability, Inc*., 322 NLRB 757, 760 (1996).

There is no evidence to support Respondent's assumption that Pace undertook these activities in order to promote himself and the rank and file unity slate.

However, even assuming that Pace engaged in the above activities in order to promote himself and the rank and file unity slate with his coworkers, such motivation is not proof of malice or bad faith. Any union seeking to supplant an incumbent as representative, and any person running for office seeking to unseat an incumbent could be expected to demonstrate to the voters that, if elected, they could be expected to better serve the interests of the electorate. Pace did no more than that. If by the successful prosecution of the charges and grievances Pace could make such a showing, there was nothing improper in his doing so.

Respondent argues further that Pace's actions were motivated by his desire that he and coworkers Hernandez and Matos

[2] *Interboro Contractors*, 157 NLRB 1295 (1966).

be permitted to work without regard to Respondent's rules. It is true that Pace asked Respondent's officials to sign a document which stated that Respondent agreed to waive its right to exercise its rules and regulations, policies and procedures toward himself, Matos and Hernandez, when the exercise of those rules would result in the reduction of wages, shift changes, suspensions, layoffs, transfer, or termination of the three men.

Pace testified that his purpose in seeking that agreement was his belief that he and the two others had been discriminated against by Respondent, and he thereby sought relief from such discrimination. The fact that Pace sought that agreement adds nothing to Respondent's argument that his activities were not protected. In asking Respondent to sign the agreement, Pace sought to remedy the treatment which he believed to be unfair, and which had been the subject to the charges and grievances filed by him or with his support.

Finally, Respondent argues that Pace has exhibited disdain and malice toward it, by telling employees and customers about his dislike for the company and its management. There was also testimony that he threatened to kill its officials. Respondent argues that there is a connection between Pace's hatred of the company and his alleged malice and bad faith in filing the charges, grievances, and complaints. However, even assuming I credit such testimony, it cannot be said that Pace's hostility toward Respondent motivated his filings, which had a legitimate basis of their own.

I accordingly find and conclude that Pace's activities in behalf of himself and other employees were protected, concerted activities.

The Law Suits Against Pace

The complaint alleges that the two law suits filed against Pace violated the Act in that they were filed because Pace engaged in the conduct set forth above, including the filing of charges and grievances, assisting other employees in doing so, making a complaint to the Union's election officer, and filing a complaint with OSHA.

The first lawsuit alleges that it was filed because Pace engaged in abuse of process and malicious prosecution.

In *Bill Johnson's Restaurant, v. NLRB*, 461 U.S. 742, 744 (1983), the Supreme Court held that it was an enjoinable unfair labor practice for an employer to prosecute a baseless lawsuit with the intent of retaliating against an employee for the exercise of rights protected by Section 7 of the Act.

The Court also held, however, that if the litigation was no longer pending, and the lawsuit is "withdrawn or is otherwise shown to be without merit" and the employer did not prevail, the Board may resolve whether the employer acted with a retaliatory motive in filing the lawsuit. 461 U.S. at 747. *Teamsters Local 520 (Alberici Construction),* 309 NLRB 1199, 1200 (1992*); and Braun Electric Co.,* 324 NLRB 1, 2 (1997).

Here, the 2 lawsuits were voluntarily dismissed with prejudice, and are no longer pending. Accordingly, the only issue is whether Respondent filed the lawsuits against Pace for retaliatory reasons. *Summitville Tiles*, supra.

The evidence is clear that the initial lawsuit dated August 12, 1996, against Pace was filed for a retaliatory purpose. The lawsuit alleges that it was filed because he filed various charges, grievances, and complaints against Respondent, and accuses him of maliciously using civil process to harass Respondent, and abuse of process because he engaged in the conduct of filing such actions. The suit states that Pace filed the cases even though he knew they were without merit, and that certain of them were dismissed. The suit seeks a permanent injunction against Pace from filing charges against Respondent and against his conspiring with and encouraging other employees to file similar charges against it. In *Summitville Tiles*, supra, the Board found a retaliatory motive in the employer's testimony that the lawsuit was filed because he believed that the union and the employees, who as here were alleged as conspirators, harassed him by filing charges.

Kamm testified that he believed that Pace's filing of certain charges with the Board and other agencies constituted harassment of Respondent. Kamm, who participated in the discussions leading up to the decision to file the lawsuit, testified in contradiction to the allegations in the suit that Respondent did not want him to stop filing the charges. He noted that the suit was not filed based on Pace's filing of specific cases with the Board, but rather for his "cumulative" filings with various agencies. Kamm added that the lawsuit was filed because he believed that Pace filed nonmeritorious cases because of self-interest, for his own "gain and notoriety."

The evidence is thus clear that this lawsuit was filed in retaliation for Pace's filing the various charges, grievances, and complaints against Respondent. The litigation was filed in response to Pace's filing of these actions, and sought to prevent him from filing further charges against Respondent, and prevent him from "conspiring with or encouraging" other employees to file charges against it. Thus, this lawsuit not only was brought to retaliate against Pace for the filing of the various causes, and, for engaging in protected concerted activities with others, but to specifically enjoin him from engaging in his right to file further charges against it. The lawsuit was a direct attempt by Respondent to nullify the Board's jurisdiction as it affects Pace. *LP Enterprises,* supra.

I accordingly find and conclude that Respondent's filing of the lawsuit dated August 12, 1996, violated Section 8(a)(1) of the Act.

The second lawsuit, dated August 20, 1996, specifically states that it is an action against Pace because of his "intimidation of, and threats of physical violence against GMC and its employees." Its allegations, supported by affidavits, set forth that Pace had threatened physical violence against Respondent's officials.

This lawsuit's primary purpose was to obtain a temporary restraining order, restraining and enjoining Pace from threatening or committing violence against Respondent's officials or employees, and from appearing at any Respondent owned or operated facility.

This lawsuit set forth statements allegedly made by Pace, threatening Respondent's officials, which prompted the action. As such, Respondent did not act improperly in bringing the lawsuit. The fact that this lawsuit realleged the matters set forth in the first matter, specifically that Pace has engaged in "vexatious, willful and malicious abuse of process" against Respondent by filing nonmeritorious charges and complaints

does not affect my conclusion that the filing of this lawsuit was not a violation. It was not brought in response to Pace's filing charges, grievances, and complaints, and no remedy was sought concerning Pace's filing those actions.

I accordingly find no violation in Respondent's filing the request for a temporary injunction against Pace.

The Discharge

I have found, above, that Pace engaged in protected union, and protected concerted activities. Respondent's animus toward his engaging in such activities is amply demonstrated by Respondent's lawsuit against him.

The suit, as set forth above, charges Pace with "vexatious, willful and malicious abuse of process" against Respondent by filing, causing to be filing, or conspiring with others to have filed, and threatening to file, charges with the Board and New York State Division of Human Rights, grievances with the Union, and with the Teamster election officer. Respondent sought to "permanently" enjoin Pace from filing charges against it, and from "conspiring and encouraging other employees to file similar charges" against it.

It is quite clear, therefore, that Respondent possessed hostility and animus toward Pace for his active role in personally, and in combination with other employees, exercising his rights under Section 7 of the Act.

While in the process of filing these cases against Respondent, Pace was discharged. I accordingly find that the General Counsel has made a showing that Pace's union and concerted activities, and his activities in filing charges with the Board, were a motivating factor in his discharge. *Wright Line*, 251 NLRB 1083 (1980).

Once the General Counsel has made such a showing, the burden shifts to Respondent to prove that it would have discharged Pace even in the absence of his protected activity. *Wright Line,* supra. I find that Respondent has met its burden.

Respondent has established that customer service is extremely important to its business. That fact has been recognized in the parties' collective-bargaining agreement, which provides that abuse of and discourtesy to customers is considered just grounds for discharge. In addition, Respondent's rules provide that such conduct is grounds for immediate termination.

It has also been established that two customers complained to Respondent about Pace's misconduct. The complaints, which were spontaneous, were not manufactured by Respondent. The customers wrote letters of complaint and testified about the situations involved. Pace conceded that there were incidents involving the two customers, and that he had a dialogue with them which the customers apparently construed as being discourteous and abusive. Respondent undertook an investigation into the incidents, found that they occurred, and concluded that Pace had been discourteous and abusive to Alexander and Royce.

Having received a final warning on February 6 following his failure to be responsive to a customer's request, which Respondent considered discourtesy, and a warning dated June 20 which advised him that Respondent had been advised that customers complained of discourtesy, Pace was advised to immediately "turn things around."

The blame for not accepting that June 20 certified letter must be placed on Pace. His refusal to accept it because he was not expecting a certified letter and did not know the sender does not alter the fact that Respondent considered his conduct, up to that point, sufficient to warrant a strong warning.

Following the final warning of February 6, 1996, Pace was involved in two verified instances of customer abuse or discourtesy which Respondent reasonably believed constituted misconduct of a level warranting termination. *Jordan Marsh Stores Corp.,* 317 NLRB 460, 476 (1995*);* and *GHR Energy Corp.*, 294 NLRB 1011, 1012–1013 (1989).

I can find no evidence of disparate treatment. Other employees have been discharged, even after only one offense, for customer abuse, or discourtesy. As to other instances of violations of company policy concerning safety, Respondent has a reasoned policy of discharging employees found to have tampered with the interlocks, but only warning those who operate the elevators with the doors open.

I find that Respondent acted consistently and fairly in issuing a final warning to Pace, and then a strong warning urging him to immediately correct his behavior while certain incidents were being investigated. Nevertheless, thereafter, the incident with Royce occurred, who then wrote a strong letter to Respondent complaining of Pace's "abusive" conduct and refusal to answer questions concerning complaints.

I accordingly find and conclude that the termination of Pace was not unlawful. *The Mandarin*, 223 NLRB 725, 729–730 (1976).

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By filing a baseless lawsuit against Pace dated August 12, 1996, index no. 96/114523, in retaliation for his protected concerted activities, Respondent violated Section 8(a)(1) of the Act.

3. Respondent has not violated the Act by filing a lawsuit against Pace dated August 20, 1996, index no. 96/115024.

4. Respondent has not violated the Act by its discharge of Pace.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Inasmuch as the lawsuit found to have violated the Act has already been voluntarily dismissed with prejudice, Respondent will not be ordered to withdraw it.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Garage Management Corporation, New York, New York, its officers, agents, successors, and assigns, shall

Cease and desist from

(a) Initiating a baseless lawsuit against employees in retaliation for their protected concerted activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facility in New York, New York, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 12, 1996.

(b) If this Order is enforced by a judgment of the United States court of appeals, the words in the notice reading "posted by order of the National Labor Relations Board" shall read "posted pursuant to a judgment of the United States Court of Appeals enforcing an order of the National Labor Relations Board."

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

(d) IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."